IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-368

KENNETH BERDICK, M.D.,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, KENNETH BERDICK, M.D., through undersigned counsel, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on July 18, 1977.

OPINION BELOW

The opinion of the Court of Appeals is reported at 555 F.2d 1329 (5th Cir. 1977). That opinion is set forth in its entirety in the Appendix to this Petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The judgment of the Court of Appeals was entered on July 18, 1977. Rehearing was denied on August 9, 1977. This Petition is timely filed.

QUESTION PRESENTED FOR REVIEW

Whether An Accused In A Criminal Case Is Denied His Fifth And Sixth Amendment Rights To Due Process Of Law, A Fair And Impartial Trial, And His Freedom From Compelled Self-Incrimination Where The Government Elicits Testimony That The Accused, After The Receipt Of Miranda Warnings, Invoked His Constitutional Right To Silence During Interrogation, Despite The Fact That The Accused Had Not Initially Invoked His Fifth Amendment Rights.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

. . . nor shall be compelled in any criminal case to be a witness against himself . . .

. . . nor be deprived of life, liberty, or property, without due process of law . . .

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . .

STATEMENT OF THE CASE

On July 22, 1976, Kenneth Berdick was charged by Indictment with 119 counts of knowingly making false statements in matters within the jurisdiction of a United States agency, in violation of Title 18, Section 1001 of the United States Code.

These charges constituted two basic types of offenses: the billing of Medicare for tests done in a laboratory at an increased and inapplicable rate for tests conducted in the office, and for the billing of Medicare for tests not performed at all. The case was prosecuted in the United States District Court, Southern District of Florida, in a trial by jury which commenced on November 4, 1976.

During the prosecution of the Government's case, the prosecution elicited the testimony of an investigator who had interrogated Doctor Berdick after warning him of his Miranda rights.[1] The investigator testified that during the course of his interrogation, Doctor Berdick at one point refused to answer the interrogator's questions:

> Then he, after hesitating, he said possibly he had received a, he had a discussion with a representative of some lab at some point in time. I asked him whether he would tell me who this person was or the lab was and he replied no, that he did not want to discuss that further.

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1 The record reflects that Doctor Berdick was apprised twice of his rights under *Miranda*, both at noon on the day of his questioning and again immediately prior to questioning at 5:30 p.m. [Appendix 7a, infra]

On appeal, Doctor Berdick contended that such testimony not only implied, by the defendant's refusal to cooperate, the commission of uncharged collateral crimes involving "kickbacks", but also, by presenting evidence of his invocation of his right to silence, annihilated his credibility in the eyes of the jury. The doctor argued that the introduction into evidence of such testimony carried an intolerably prejudicial impact of constitutional dimension which could not help but insinuate his wrongdoing and inescapably prejudice the jury against him.

The Court of Appeals refused to recognize any Fifth Amendment issue and held:

> 3. There is no merit to the contention that the Government elicited testimony referring to appellant's constitutional right to remain silent, thus violating his Fifth and Sixth Amendment rights against self-incrimination and deprivation of a fair trial. Contrary to appellant's allegation, he did not remain silent when questioned by the testifying witness, an investigator for the Department of Health, Education and Welfare, but attempted at length to explain the various misrepresentations in his Medicare billings. Appellant's reliance on *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975); *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and related decisions is misplaced.

The Court, *per curiam*, affirmed the doctor's conviction. On August 9, 1977, it denied his petition for rehearing. This Petition for Writ of Certiorari follows, seeking review of the court's conclusion that the

petitioner's failure to be completely silent precludes his challenge to evidence adduced at trial of his refusal to answer a particular question during pretrial interrogation.

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Presents An Important Issue Of Constitutional Law Affecting The Rights Of All Citizens And The Obligations Of Criminal Courts To Protect Those Rights, Which Has Not Yet Been, But Should Be, Settled By This Court.

The issue presented in this case involves the scope of the protection provided by the Fifth Amendment guarantees against compelled self-incrimination and due process of law as well as the Sixth Amendment's guarantee of a fair and impartial trial. Specifically, the issue involved is whether evidence of an accused's invocation of his right to silence in the face of accusation and his refusal to cooperate during interrogation can ever be properly admitted into evidence in a criminal case, despite the fact that the accused may have answered other questions without objection and otherwise cooperated with his interrogators. Because the issue presented by this case affects the basic prosecutorial function and procedure employed in every criminal prosecution, and which therefore could directly affect any citizen of the United States, it is one of universal as well as constitutional importance.

Reference to a defendant's refusal to answer police questions is a violation of the defendant's privilege

against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Miranda*, this Court directed that it was error for a prosecutor to refer to the defendant's silence in the face of a police interrogation:

> In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. *Id.* at 468.

Thereafter, in *United States v. Hale*, 422 U.S. 171 (1975), this Court held that it is reversible error for a prosecutor to attempt to impeach a defendant by cross-examining the defendant as to his silence at the time of his arrest. Although this Court did not base its decision on constitutional grounds, it reversed Hale's conviction despite the immediate curative instruction which the Court had given the jury as to the impropriety of the prosecutor's cross-examination and despite the Court's instruction to the jury to disregard the testimony. This Court explained the inherent unreliability of such improper evidence:

> Not only is evidence of silence at the time of arrest generally not very probative of a defendant's credibility, but it also has a significant potential for prejudice. The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that

> the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest. 95 S.Ct. at 2138.

In this Court's most recent opinion on the subject, in *Doyle v. Ohio*, 426 U.S. ____, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), it held that the use of a defendant's silence at the time of arrest and after receiving Miranda warnings, for impeachment purposes, violated the right to due process of law as guaranteed by the Fourteenth Amendment. Noting that "silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights", this Court reasoned that it is fundamentally unfair as well as unconstitutional to first warn a suspect that he has a constitutional right to remain silent and then to use the fact that he did remain silent against him at trial.

Although this Court's previous decisions have consistently and clearly condemned the use of evidence of an accused's silence in the face of accusation at a subsequent criminal trial, they have not specifically addressed the issue presented herein, i.e., whether, as the Court of Appeals held, the defendant's failure to "remain silent when questioned by the testifying witness, an investigator for the Department of Health, Education, and Welfare" and the fact that he "attempted at length to explain the various misrepresentations in his Medicare billings" precludes his right to complain about the introduction of evidence concerning his refusal to answer specific questions during the course of interrogation. The Fifth Circuit Court of Appeals resolved this issue in the affirmative and expressly found Doctor Berdick's reliance on *Hale* and *Doyle*, and related decisions to be misplaced. *United States v. Berdick*, 555 F.2d at 1330.

Because this Court is the ultimate arbiter of Constitutional principles, and since the lower court has expressed a rule of law that exempts from constitutional protection those accuseds who invoke their Fifth Amendment rights only selectively during interrogation rather than consistently, it is vital that the question presented herein be resolved by this Court.

II.

The Decision Below Conflicts With The Court Of Appeals Decisions In *United States v. Ghiz*, 491 F.2d 599 (4th Cir. 1974) And *Booton v. Hanauer*, 541 F.2d 296 (1st Cir. 1976).

In *United States v. Ghiz*, 491 F.2d 599 (4th Cir. 1974), precisely as in the case at bar, an agent of the Government was permitted to testify that the defendant had invoked, with regard to "certain" questions, his Fifth Amendment right to silence.[2] The testimony elicited in that case was almost identical to that complained of here:

> Q. Mr. Knott, did you have any further conversation with Mr. Ghiz on that occasion?
>
> A. Yes, sir. We started to ask him some questions about the Mack tractor that he purchased from Mr. Pauley, at which time he stated that he did not desire to answer any questions concerning that tractor and the interview was terminated.

The court held that if, in declining to answer certain questions, a criminal accused invokes his fifth amendment privilege or in any other manner in-

2 In fact, the *Ghiz* decision indicates that Mr. Ghiz had been interviewed twice and had apparently cooperated throughout both periods of questioning until a certain question was asked.

dicates he is relying on his understanding of the Miranda warning, evidence of his silence or of his refusal to answer specific questions is inadmissible. [491 F.2d at 600].

Similarly, in *Booton v. Hanauer*, 541 F.2d 296 (1st Cir. 1976), the deputy sheriff was permitted to testify that, during *further* questioning of the defendant in regard to a homicide, "I asked her other questions about the clip, and who put the clip in, and so forth. And she refused to answer any more questions".

On appeal, the court acknowledged the error committed:[3]

> We think it was constitutional error to introduce the instant petitioner's *eventual refusal to answer further questions*. A rule of inadmissibility is appropriate because the very introduction of such a refusal can give rise to an impermissible inference of guilt that constitutes a penalty upon the exercise of constitutionally-based rights. 541 F.2d at 299. [Emphasis added].

The decision of the Court of Appeals in this case, therefore, conflicts directly with the decisions of the First and Fourth Circuit Courts of Appeal on exactly the same issue. Since the decision in the case at bar expressly precludes an accused's reliance at trial on the protection afforded by the Fifth Amendment if he does not consistently assert his right during interrogation,

3 The *Booton* court declined to reverse the defendant's conviction finding under the particular facts of the case that the error complained of was harmless beyond a reasonable doubt. It is important to note that the Court of Appeals in the case *sub judice* did not base its affirmance of Doctor Berdick's conviction on any doctrine of harmless error, but rather refused to recognize that a Fifth Amendment violation had occurred.

it creates an unjustifiable and irreconcilable conflict among precedents. This Court provides the only forum in which that conflict can be resolved. Because the issue presented in this case involves the limits and scope of the Fifth Amendment rights of every citizen accused of a crime, the issue is not a *rara avis* and certiorari should be granted to define with precision and finality the bounds of the constitutional provisions involved.

CONCLUSION

For the foregoing reasons, the Petitioner requests this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing was this ____ day of September, 1977, mailed to

Hon. Daniel M. Friedman
Acting Solicitor General of the United States
Room 5614
U. S. Department of Justice
Washington, D. C. 20530

GEOFFREY C. FLECK

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

versus

Kenneth BERDICK, M. D.,
Defendant-Appellant.

No. 77-5011
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

July 18, 1977.

Appeal from the United States District Court for the Southern District of Florida.

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

PER CURIAM:

Appellant Kenneth Berdick, a medical doctor, was convicted by a jury on 41 counts of knowingly making false, fictitious and fraudulent statements regarding material facts in a matter within the jurisdiction of the Department of Health, Education and Welfare and the Social Security Administration, in violation of 18 U.S.C. § 1001. Overwhelming evidence presented by the Government showed that on numerous occasions appellant billed Medicare for tests which were either not performed or performed at laboratories for which inflated and inapplicable rates were charged by appellant. Appellant alleges several errors on appeal, all of which are without merit. We affirm.

* Rule 18, 5 Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

Our study of the issues raised convincingly shows that:

1. There was no error by the trial court in denying defendant's motion for mistrial based on alleged prejudicial exposure by the jury to a newspaper article which was completely irrelevant to the trial.[1] *Marshall v. United States*, 360 U.S. 310, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *Gordon v. United States*, 5 Cir., 1971, 438 F.2d 858; *Smith v. United States*, 5 Cir., 1967, 385 F.2d 34.

2. The remarks made by the trial court in commenting on the evidence were entirely within its discretion. The comments were not only fair and impartial but necessary to avoid lengthy, redundant and confusing testimony. *See United States v. Owens*, 5 Cir., 1971, 453 F.2d 355; *Posey v. United States*, 5 Cir., 1969, 416 F.2d 545; *United States v. Dopf*, 5 Cir., 1970, 434 F.2d 205.

3. There is no merit to the contention that the Government elicited testimony referring to appellant's constitutional right to remain silent, thus violating his Fifth and Sixth Amendment rights against self-incrimination and deprivation of a fair trial. Contrary to appellant's allegation, he did not remain silent when questioned by the testifying witness,

1 On the fifth day of the trial, the following caption appeared in the *Miami Herald:*

35 Florida Clinics, Practitioners Got More Than $100,000 from Medicaid.

Although the trial judge observed that the newspaper article did not mention defendant's name nor relate in any manner to the trial, he nevertheless allowed the polling of the jury to ascertain whether they had seen the article. Only two of them had seen the caption and none of them had read the article. The offer by the trial court to excuse the two jurors was rejected by the defense.

an investigator for the Department of Health, Education and Welfare, but attempted at length to explain the various misrepresentations in his Medicare billings. Appellant's reliance on *United States v. Hale*, 422 U.S. 171, 95 S.Ct. 2133, 45 L.Ed.2d 99 (1975); *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and related decisions is misplaced.

4. Finally, it was within the discretion of the trial court to permit rebuttal testimony of a Government witness who had remained in the courtroom during the prosecution's case, left thereafter, and who was later called by the Government to rebut impeaching testimony of a defense witness. *See Barnard v. Henderson*, 5 Cir., 1975, 514 F.2d 744.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5011
Summary Calendar

D. C. Docket No. 76-333-Cr-JE

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KENNETH BERDICK, M.D.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

Before AINSWORTH, MORGAN and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

July 18, 1977

Issued as Mandate:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-5011

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

KENNETH BERDICK, M.D.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING
(August 9, 1977)

Before AINSWORTH, MORGAN, and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:
/s/ ROBERT A. AINSWORTH, JR.
United States Circuit Judge

EXCERPT OF TRIAL TESTIMONY

determine whether she likes or dislikes —

THE COURT:
Sustained. That is argument.

MR. FARRAR:
I have no further questions.

THE COURT:
Thank you, very much, young lady. You can step outside.

MR. FARRAR:
Call Mr. Price, Your Honor.

[Thereupon, the witness was excused.]

Thereupon:

DEWEY PRICE

was called as a witness on behalf of the Government who, after having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. FARRAR:

Q Mr. Price, would you please state your full name and occupation.

A Yes. My name is Dewey Price and I am a programming integrity specialist with the Bureau of Health Insurance, part of the Social Security Administration, the Department of Health, [522] Education and Welfare.

Q What is your function?

A My office investigates possible irregularities, abuses of, possible fraud cases of the Medicare program.

Q Now, sir, directing your attention to June 11th of this year, did you have an occasion to interview anyone?

A Yes, I did.

Q And who was that, sir?

A Dr. Kenneth Berdick.

Q How did that interview take place, sir?

A Mr. Foster, who works with Social Security Administration also and I went to Dr. Berdick's office to interview him.

We arrived in the morning and were told the doctor was not there until after lunch so we came back and he was busy with patients and we did talk to him briefly and he suggested we come back at 5:30, which we did. And the interview then was held at 5:30.

Q What happened?

First of all, where exactly did it [523] take place, in his office?

A In Dr. Berdick's office. He sat at his desk.

Q All right, who all was present?

A Bob Foster and myself.

Q And, sir, what was the first thing or how did it begin?

A When we spoke to the doctor at around lunchtime I explained to him that the reason we had come to see him and that at that time I explained his rights to him that he did not have to talk to me or have the interview, that if he wished, he could have an attorney present, that he should understand that any information he gave me might be used against him in a court of law or other legal proceedings. And so then, when I came back at 5:30, I reiterated those things to him before the interview started.

Q All right. And what was said, then, sir?

A Initially, I asked the doctor if he would explain to me how Medicare forms were prepared in his office.

He had stated when the, when I had given him his rights that he wanted to cooperate [524] fully, that he stated that, you know, he would answer any questions.

Consequently, I asked him then to discuss how Medicare forms were routinely prepared in the office.

He stated that the girls would normally prepare the form, that they would enter the procedures that were done.

I asked him how they would know what to put on the Medicare forms.

He stated that the, they would have the patients' charts which would show whatever was done, for example, an office visit or an x-ray and whatever, they would enter on the Medicare form, whatever procedures had been done.

I asked him who would do the, enter the diagnosis and he stated that normally he would, for a new patient or for patients who got complete workups because the diagnosis had to be related to the procedures that had been done on this workup.

I asked him how the girls would know what to put in as the charges and he replied that they had a set format of charges that he had given them to use.

[525] Q Did you have any discussion concerning errors that might have been made in January, sir?

A Yes. The doctor had, when I, going back, when I gave him his rights he said that he wanted to cooperate and he said that the, that he had become aware the past January of problems with a few, the Medicare forms had been sent in. He stated that consequently he stayed late at night and reviewed all the Medicare forms and the Medicare patients' charts and said that he found two or three that there had been problems on.

He stated that he called GHI, the Group Health, Incorporated, the Medicare carrier, and discussed this with someone there and that he was told that if he got too much money on those two or three cases to send it back.

He said he did not, so no money was returned.

Q Now, sir, did you show him any 1490's while you were there?

A Yes, in the discussion, discussing how the forms were filled out, I used three as examples initially, just to get an idea who filled [526] out what on the forms.

The first one was one on a Mr. Eli Goldblatt which was filled out in early 1974.

This form had been typed in as far as the procedures done and he said that one of the girls would have typed this in.

He identified his signature on the bottom of the form and also identified his handwriting on the statement, written on the bottom of the form, "all tests manually done".

There were two other forms that I showed him, another one that billed for lab work in early 1974, which he said was also written, the procedures written by the girl that he wrote in "all tests manually done," and signed the form. The last one was one on Mr. Alex Weiss, which was submitted in 1976, which he identified, I believe, as just his signature on the form.

Q Did you discuss any employees he may have had?

A Yes. I next asked the doctor who his employees were and what their functions were.

He replied that currently he had working for him Miss Penny Ferrara and a lady by the [527] name of Shevra Zerof, I believe the name was, her name was pronounced. He said that a Melissa Taks was a former

employee of his who was away at college and would be back the next week for the summer break and she would be coming to work for him.

Then he identified a Miss Rosenman who had worked for him and who he said now was in New York and he identified a Mary Rose who he said left his employment in January of this year.

I asked him what these people did as far as their jobs and he stated that they, that rather than have any specialization he preferred all the girls to do everything, that he would hire people with medical assistant background and then they would do everything.

He specifically volunteered at this time that, for example, with lab work, that all the girls would draw blood, that he wanted all of them to be able to do everything.

He in regard to lab work, he said that they were doing all the blood work in the office up until the late 1974 or early 1975.

He said that it was taking one, first one then two girls full-time just to do these, this [528] blood work and that because of this, he quit doing the blood work in the office when multiple procedures had to be done and started sending it to an automated, to a lab to be done by the laboratory.

I believe at that time I remarked to the doctor that I was surprised to hear his explanation of how lab work was handled in the office prior to 1975, early 1975 or late '74, because — and I asked him, was it not true that in 1971 and '72, he had sent blood to Chem Lab Corporation to be done, in 1973 and '74, had sent blood to LaHuis Labs to be done.

He changed his explanation of how the lab work was done immediately and said that, yes, he had sent blood to those labs to be, to be performed during those periods of time.

Q Did you ask him or have any discussion about how he billed for this lab work?

A Yes.

I asked him how he handled the billing of Medicare for lab, the lab tests performed by these laboratories.

He replied that he billed a single separate charge for each individual test done.

[529] I asked him why he did that and he replied that he understood the laboratory did each test manually.

I asked him why "O" was shown on the Medicare form as the place of service, "O" for office, and he replied that that was, this was an oversight and I asked him how much the lab, how much the lab would charge him for doing a profile on one of the people who typically got a complete examination and he replied twelve to fifteen dollars.

I asked him what, how he related his single charge for each of the fifteen to twenty tests done to their single charge for the profile and he replied that it was not directly related and no further explanation.

Q Did you discuss any Blue Shield Newsletters with him?

A Yes. He, at this time he explained that he had quit billing for lab work in late 1974, early 1975, the way he had done it previously, because he believed he learned from a Newsletter sent out by Blue Shield that this was the improper way to bill for lab work.

I asked him if he specifically recalled [530] receiving in early 1974 a Newsletter which explained the very fact of how doctors were not to bill for manual tests when they were having automated profiles of tests done in a laboratory somewhere and he denied recalling getting any such Newsletter in early 1975.

I then asked him how he billed, handled billing for lab work since that time, since early 1975 or late 1974

when he said he no longer billed for it. He replied that the blood would be, when the blood was sent to the lab to be done since that time he would send along with the blood a 1490 signed by the patient which the, and the laboratory would handle their own billings for the, for the laboratory tests that they had performed.

He told me that he began using a Laboratories of Florida as the lab where he primarily sent blood beginning in early 1975.

I asked the doctor if he owned any interest in Laboratories of Florida and he said no.

I asked him if he received any kind of payments from Laboratories of Florida or from Delmar Porter who owned the lab, and he replied no.

I asked him if he had received any offer of any kind of payment be they drawing fees, [531] kickbacks, rebates or whatever from Mr. Porter of Laboratories of Florida or any other laboratory and he replied no.

Then he, after hesitating, he said possibly he had received a, he had a discussion with a representative of some lab at some point in time. I asked him would he tell me who this person was or the lab was and he replied no, that he did not want to discuss that further.

Q Did you discuss procedures followed when complete physicals were provided his patients?

A Yes. I asked what was typically done, would be done on a patient who came in for a complete physical or workup and the doctor replied in addition to his examination of the person, listening to the heart, lungs and everything, that he had certain other tests and procedures run.

I believe I recall he mentioned specifically a cardiogram, chest x-rays, Pap tests for ladies, prostate checks for men, stool tests and sigmoidoscopies as all being routinely done on a complete physical.

Q Did you discuss how he did a sigmoidoscopy or his procedure in performing that with him, [532] sir?

A Yes. I was aware of this form from the investigation, so I asked the doctor if, when this was done, if he discussed beforehand with the patient what was going to be done and how he would go about doing it.

He replied that, yes, that particularly with elderly people he usually discussed the matter beforehand with them, because the elderly patients have many problems, rectal problems, hemorrhoids and other conditions which might cause problems which, he consequently did, caused him to discuss this with the patients before the matter was, procedure was performed.

Q Did you discuss any mistakes involved in sigmoidoscopies?

A I asked if he would bill for a sigmoidoscopy when only a prostate check was given and he replied no, that that was not, would not be done, that he would bill for sigmoidoscopies when it was done.

Q Sir, did you discuss any specific patients with him at that time?

A Yes. I then told the doctor that I [533] would like to discuss certain, some specific cases with him where we had discovered possible irregularities and that it would help if he would make his records available to us on those patients.

He said yes, he would, and I gave him, and initially I gave him a list, I believe, of seven or eight people and he went to pull his medical records on those patients so that we could have it in discussing the patients.

Q Do you remember what was said about the patients?

A If I might refresh my memory from the notes I made on those specific patients that I, I discussed, I believe there was eight patients with the doctor.

The first one was a patient by the name of Bertha Spitalnick.

Dr. Berdick told me that he could not find his record on this patient, that from looking at the record on the Medicare form, the 1490 that I had on her, that he believed she was a patient at his Miami Beach office so the file would be over there.

I explained to the doctor what the [534] possible problem was in the case. I said the lady said she came for a complete physical. She said she paid $60, that she has a receipt which I had seen and that the Medicare form signed in showed that nothing was paid and that four days later she came in for a follow-up visit to find out the results of the physical and to also get what she was told would be a free flu shot which she thinks she got but that the Medicare form sent in for this visit billed for a shot of apresline was the substance and that also billed for a glucose test, and showed the lady had diabetes mellitus, and that the lady told me she did not ever have diabetes and that no blood test was taken from her on that visit.

The doctor said his file was not available and he did not recall but that if that happened it was obviously a mistake.

Q Did you talk about a Miss Gottlieb?

A Yes. The doctor also was unable to find a file on this patient and again his explanation was that it was a Miami Beach patient and that file would be at the Miami Beach office.

Q Did you discuss Mr. Weirs with him? Or Weiss, I am sorry.

[535] A Yes. The form on Mr. Weiss billed for a sigmoidoscopy and Dr. Berdick reviewed his file, chart on this patient and admitted that no sigmoidoscopy was performed, according to what was shown on the chart. He refused to allow me, I asked to see the patient's chart on Mr. Weiss and he refused to allow me

to actually look at the chart, saying that he felt because of his obligation to the patient he did not think that I should, that I should look at that form.

I asked him why the 1490 would have billed for a sigmoidoscopy if one was not shown on the chart and he replied that the girls were using a format to bill for the complete physical which he provided to them and that consequently they billed, they wrote down sigmoidoscopy and in this case it might not have been given, but that the mistake happened because the girls were using the format and that, that if it was not, if it appeared on the 1490, because of that.

I asked him then, I said, would that contradict what you told me that they would use the patient's chart to see what had been given to patients, and he admitted that it did contradict, but [536] he explained that they had begun using the format for complete physicals.

Q Did you discuss a patient by the name of Jacobs?

A Yes, I did. This was a claim submitted in 1974 and involved lab work and —

MR. KOGEN:

Hold on a minute. I didn't hear the answer. Would you read back the first few words he said?

THE COURT:

This involved a claim submitted in 1974.

MR. KOGEN:

Thank you.

THE WITNESS:

For lab tests done was what I was concerned about.

The doctor looked at the form and said that he had put in that, that "O" had been put in as a place of service, that he had written in this note, "all manually done" at the bottom, and he explained that when the lab

would have picked up, the lab would have actually come to the office and picked up the blood and done the test and sent the results back to him.

BY MR. FARRAR:

Q Did you discuss a patient by the name [537] of Ferber?

A Yes. The only discussion on this was that he identified the statement, "all tests manually done" written at the bottom as his handwriting.

Q Did you discuss a patient by the name of Lieberman?

A Yes. This 1490 also billed for a sigmoidoscopy which I was concerned with.

Dr. Berdick stated initially that that patient was, he had had a disagreement with the patient and that the gentleman was no longer a patient of his.

He admitted that the chart did not show that the sigmoidoscopy was done on the date that it was shown and he explained that he had not gotten paid on this, this charge anyway, so there was no, should be no problem with it.

Q Did you discuss a patient by the name of Heller?

A Yes, I did.

Dr. Berdick explained that Mrs. Heller had called him after I had been to visit her and spoke with her about the Medicare claim submitted [538] on her account and he told me that Mrs. Heller now recalls getting a sigmoidoscopy, that he, his patient record, he said, showed that both a Pap test and the sigmoidoscopy was given to Mrs. Heller.

I asked him why the 1490 did not bill for a Pap test if, and only billed for a sigmoidoscopy if both of them were done, and he replied that he knew that Medicare

would not pay for Pap test routinely so therefore on the complete physicals they did not bill for them.

MR. FARRAR:

May I have just one moment, Your Honor?

I have no further direct examination.

UNITED STATES of America,
Appellee,

v.

Louis GHIZ, Appellant.

No. 72-1728.

United States Court of Appeals, Fourth Circuit.

Argued Jan. 11, 1974.

Decided Feb. 5, 1974.

Before HAYNSWORTH, Chief Judge, and RUSSELL and WIDENER, Circuit Judges.

HAYNSWORTH, Chief Judge:

Louis Ghiz was convicted by a jury in the United States District Court for the Southern District of West Virginia of transporting a stolen vehicle from Charleston, West Virginia, to Gary, Indiana, in violation of 18 U.S.C. § 2312. He was sentenced to two years imprisonment, from which he appeals.

Because Federal Bureau of Investigation agent, Knott, was allowed to testify as to the defendant's assertion of his fifth amendment privilege, we must reverse.

Several FBI agents interviewed Ghiz twice in regard to the charge in the indictment and related crimes and incidents. Special Agent Calvin D. Knott testified concerning one of these conversations as follows:

> Q. Mr. Knott, did you have any further conversation with Mr. Ghiz on that occasion?
> A. Yes sir. We started to ask him some questions about the Mack tractor that he purchased from Mr. Pauley, at which time he stated that he did not desire to answer any questions concerning that tractor and the interview was terminated.

The defendant claims that this testimony constitutes an improper reference to an exercise by him of his fifth amendment privilege.[1] The Supreme Court has clearly held that a defendant's refusal to answer questions cannot be used against him at trial, Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and this Court has recently indicated that if, in declining to answer certain questions, a criminal accused invokes his fifth amendment privilege or in any other manner indicates he is relying on his understanding of the Miranda warning, evidence of his silence or of his refusal to answer specific questions is inadmissible. United States v. Moore, 4 Cir., 484 F.2d 1284, 1285-1286.

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1 While the government contends that the testimony was admitted without objection, the record clearly indicates that defense counsel vigorously objected to its admission at the in-chambers suppression hearing and preserved the continuing objection at that time without the necessity of voicing another objection as the evidence was presented to the jury.

There can be little doubt that in stating that he did not desire to answer any questions concerning the Mack tractor, Ghiz was relying on his understanding of the Miranda warning which had been read to him at the beginning of the interview. He was on trial for the unlawful transportation of the Mack tractor and the jury may well have found significance in his refusal to talk about it. The testimony of Agent Knott was, therefore, inadmissible and the conviction must be reversed.

In Boeckenhaupt v. United States, 4 Cir., 392 F.2d 24, we declined to reverse a conviction where an FBI agent while testifying as a witness, twice alluded to the fact that the defendant, on advice of counsel, had declined to answer two questions. We said the answers were improper, but we found them harmless error in the context of a long and complicated trial and in light of the facts that the answers of the witness were not called for by the unobjectionable questions of the prosecutor and further references of this sort were foreclosed by a curative instruction by the court to the witness in the presence of the jury. Here we have no such moderating circumstances.

Ghiz raises several other issues on appeal. Since there may be a new trial in this case, we find it appropriate to observe that none of these other issues constitutes reversible error.

Reversed.

Francis BOOTON, Petitioner-Appellant,

v.

Dorothy W. HANAUER, etc., et al.,
Defendants-Appellees.

No. 76-1076.

United States Court of Appeals, First Circuit.

Argued May 5, 1976.

Decided Sept. 2, 1976.

Before COFFIN, Chief Judge, McENTEE and CAMPBELL, Circuit Judges.

COFFIN, Chief Judge.

Petitioner-appellant was indicted in New Hampshire for the second degree murder of her husband; a jury convicted her of first degree manslaughter. Her unsuccessful appeal to the New Hampshire Supreme Court included the two constitutional issues upon which her instant habeas corpus petition is based. *State v. Booton*, 114 N.H. 750, 329 A.2d 376 (1974), *cert. denied*, 421 U.S. 919, 95 S.Ct. 1584, 43 L.Ed.2d 787 (1975). The petition was denied in a thorough opinion by the district court which granted a certificate of probable cause.

Petitioner charges first that two newspaper articles published during her trial deprived her of a fair trial.

The first article reported that the trial judge had denied defense motions for directed verdicts based upon the prosecutor's opening statement. This was incomplete, for the judge had also reserved the right to

change his ruling during the course of the trial. Defense counsel argued prejudice from the inaccuracy and, because the ruling had occurred outside the jury's presence, he sought a voir dire. The trial court felt that the article was not prejudicial, and that a voir dire would be counterproductive to a fair trial. The judge noted that the jurors had been warned against reading newspaper coverage.

The other article reported a deputy sheriff's questioning of defendant at her home after she called the police to the scene. The witness actually testified:

> "And after I asked her who was holding the gun when it was fired, she became upset. She kept saying, 'We were only fooling around with the gun. We were only fooling around with the gun.' She said, 'I must have been holding the gun.' "

The article condensed this testimony as follows (with a correction for a transposed line): "Rockingham County Sheriff's Deputy Robert Farrar testified Monday that when he interrogated Mrs. Booton, she told him, 'I must have had (the gun) when the shots were fired.' " This was inaccurate, but it was not substantially misleading. Again, the trial judge ruled that the article did not contain the capacity to prejudice the trial; and he noted that on the evening prior to publication of this article the court had specifically warned the jurors against reading the paper. And in his charge, he carefully warned the jury to consider only evidence admitted before it in court.

The ruling on prejudice is within the trial judge's discretion. *Holt v. United States*, 218 U.S. 245, 251, 31 S.Ct. 2, 54 L.Ed. 1021 (1910). We cannot say that the reports contained enough capacity for prejudice to create the danger of a denial of a fair trial or of due process. *Cf. United States v. Concepcion Cueto*, 515 F.2d 160, 163 (1st Cir. 1975). And when inaccuracies in reports of proceedings occurring out of the presence of the jury are harmless, a voir dire will only call undue attention to them and waste time. *See* A.B.A. Standards relating to Free Press and Fair Trial, § 3.5(f) (approved draft, 1968) (calling for voir dire during trial only if "serious questions of possible prejudice" are raised).

Appellant also claims constitutional error arising from testimony by the deputy sheriff that, in further questioning the defendant, "I asked her other questions about the clip, and who put the clip in, and so forth. And she refused to answer any more questions." This testimony provoked a motion for a mistrial, which was denied.

There can be no doubt that the prosecutor may not at trial use as evidence of substantive guilt the fact of defendant's silence in the face of accusations. *Miranda v. Arizona*, 384 U.S. 436, 468 n. 37, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *see Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Nor may the state constitutionally impeach a defendant's trial testimony with proof of post-arrest silence. *Doyle v. Ohio*, ___ U.S. ___, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). Evidence of refusal to answer specific questions in the course of an interview has been held inadmissible. *United States v. Ghiz*, 491 F.2d 599 (4th Cir. 1974).

We think it was constitutional error to introduce the instant petitioner's eventual refusal to answer further questions.* A rule of inadmissibility is appropriate because the very introduction of such a refusal can give rise to an impermissible inference of guilt that constitutes a penalty upon the exercise of constitutionally-based rights. *But see Jackson v. State*, 19 Cr.L. Rep. 2109 (Tennessee S.Ct. Mar. 22, 1976). This is not to say, however, that the error may not, in particular cases, be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *United States v. King*, 485 F.2d 353, 360 (10th Cir. 1973).

We first note the absence of any kind of aggravating circumstances which have led to reversals of convictions in other cases. Here, the introduction of petitioner's refusal to continue answering questions was neither a dramatic nor a telling event. Mrs. Booton herself had called the police, reporting an "accidental shooting". She was willingly interviewed. Her answers to questions surrounding the actual shooting, however, were mostly general and unresponsive, including her oft-repeated statement: "We were only fooling around with the gun." (The one exception to this was her admission that she must have been holding the gun.) She was clearly distraught, apparently confused. The posture of the questioning was not accusatory as in, *e. g., Cockrell v.*

* We do not agree with the New Hampshire Supreme Court that the testimony was, in context, unresponsive. While the prosecutor asked only what *question* the deputy had next propounded, the whole line of questioning up to that point had followed a pattern of similar prosecutor's questions followed by the witness' narration of both the question he asked and the answer given in response. We do not believe the introduction of this testimony may be classed as inadvertent. We do not decide if inadvertence would affect the analysis.

Oberhauser, 413 F.2d 256 (9th Cir. 1969), but was directed instead at keeping her calm while also eliciting information. In contrast to *Ghiz, supra*, the query at which she cut off questioning was not a particularly important one. Moreover, the testimony was not calculated to damage a point upon which a defense was being constructed, *see United States v. Impson*, 531 F.2d 274 (5th Cir. 1976); nor do we believe it constricted her decision whether to take the stand. Her statements had placed her alone with her husband fooling around with the gun, and holding the gun when it was fired. Unless she were to deny on the stand that scenario, her eventual silence at the scene would not, under the circumstances of her emotional distress (which was perfectly consistent with lack of culpability), have tended to impeach any more detailed or specific story to which she might have testified. Finally, there was no comment (direct or indirect) on this point by the prosecutor, and indeed the court strongly charged the jury that: "She had the right to terminate the questioning at any time, and you have no right to infer anything from that because we don't penalize people for invoking legal rights."

In the present case we are convinced that any such inference as might have been drawn by the jury from the inadmissible evidence was inconsequential, in the light of the overwhelming, identical inference drawn from admissible evidence, namely, petitioner's earlier answers. Petitioner's answers at the scene in themselves constituted a repeated failure to tell a complete story. The jury could have attributed this to emotional distress and shock from the death of her husband, no matter what the cause; to confusion about her role in the incident; to an inability to deal with the

reality of the shooting; to a suspicion, or knowledge, of her own culpability; or to a combination of such factors. But we are convinced beyond a reasonable doubt that whatever inference the jury might have impermissibly drawn from her eventual refusal to testify would have been cumulative and harmless. The inference (adverse or not) already drawn from her nonspecific answers could not have been changed as between a choice of (a) the jury getting no more information about the interview or (b) the jury learning that she stopped the interview.

We therefore rule that the error in admitting proof of post-arrest silence was harmless.

The denial of the writ of habeas corpus is affirmed.

No. 77-368

In the Supreme Court of the United States

OCTOBER TERM, 1977

KENNETH BERDICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 555 F. 2d 1329.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1977. A petition for rehearing was denied on August 9, 1977. The petition for a writ of certiorari was filed on September 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the admission into evidence of petitioner's refusal to answer a single

question during a lengthy, noncustodial interview constituted reversible error.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on 41 counts of knowingly making fraudulent Medicare claims, in violation of 18 U.S.C. 1001. He was sentenced to concurrent terms of two years' imprisonment on each count and a fine of $45,000.

The evidence showed that petitioner, a physician, operated the Point East Medical Center from 1970 to 1976 (Tr. 125, 726). During that time the Center's laboratory work was performed by two outside companies, Chem Lab and LaHuis Labs, both of which used inexpensive automatic testing processes (Tr. 82-93). Petitioner submitted inflated Medicare claims to the Department of Health, Education, and Welfare, misrepresenting that the laboratory tests were done manually in the center (Tr. 40, 41, 51-54, 72-75).[1] Medicare and Chem Lab officials alerted the Center's manager, Isadore Rudnick, to the incorrect billings (Tr. 128, 143, 162). When Rudnick and two other Center employees confronted petitioner, he directed them to continue billing at the inflated and inapplicable rates (Tr. 127, 130, 325-328, 364). Moreover, petitioner billed Medicare for tests, injections, and examinations that, according to the testimony of fourteen patients and five Center employees, had never been performed (Tr. 177, 195, 212, 233, 248, 260, 263, 272, 275, 280, 284, 289, 294, 402, 412, 418, 423,

[1]The government also introduced documentary evidence of the fraudulent billings (Tr. 40, 41, 51, 82-93; Gov't Exhs. 2-1 to 2-64).

455, 485, 486, 495, 497, 513-515, 907-910, 918-920, 924-926). After the investigation into petitioner's fraudulent scheme had commenced, he asked a patient and two employees to lie about the Center's practices (Tr. 28, 126-128, 178-185, 473).

Petitioner took the stand at trial and attributed the fraudulent billings to his office personnel (Tr. 220, 224, 229, 233, 235, 281, 295, 296, 733, 736). He also contended that the examinations for which he billed Medicare had been performed (Tr. 744-747).

ARGUMENT

1. Petitioner contends (Pet. 5-6) that the district court committed reversible error in allowing a government witness to testify that petitioner had refused to answer a single question during the course of a wide-ranging, noncustodial interview conducted at petitioner's office by an investigator of the Department of Health, Education, and Welfare as part of an ongoing Medicare investigation.[2] Contrary to petitioner's claim (Pet. 6-8),

[2]The pertinent part of the testimony of the Health, Education, and Welfare Investigator detailing the interview (Tr. 528-533; the challenged portion is in italics) is as follows (a more complete transcript of that testimony is set out at Pet. App. 6a-17a):

> Q. Did you ask him or have any discussion about how he billed for this lab work?
>
> A. Yes. I asked him how he handled the billing of Medicare for lab, the lab tests performed by these laboratories.
>
> He replied that he billed a single separate charge for each individual test done. I asked him why he did that and he replied that he understood the laboratory did each test manually.
>
> I asked him why "O" was shown on the Medicare form as the place of service, "O" for office, and he replied that that was, this was an oversight and I asked him how much the lab, how much

the introduction of this evidence did not contravene the principles enunciated in *Doyle* v. *Ohio*, 426 U.S. 610, and *United States* v. *Hale*, 422 U.S. 171. In those cases this

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the lab would charge him for doing a profile on one of the people who typically got a complete examination and he replied twelve to fifteen dollars.

I asked him what, how he related his single charge for each of the fifteen to twenty tests done to their single charge for the profile and he replied that it was not directly related and no further explanation.

Q. Did you discuss any Blue Shield Newsletters with him?

A. Yes. He, at this time he explained that he had quit billing for lab work in late 1974, early 1975, the way he had done it previously, because he believed he learned from a Newsletter sent out by Blue Shield that this was the improper way to bill for lab work.

I asked him if he specifically recalled receiving in early 1974 a Newsletter which explained the very fact of how doctors were not to bill for manual tests when they were having automated profiles of tests done in a laboratory somewhere and he denied recalling getting any such Newsletter in early 1975.

I then asked him how he billed, handled billing for lab work since that time, since early 1975 or late 1974 when he said he no longer billed for it. He replied that the blood would be, when the blood was sent to the lab to be done since that time he would send along with the blood a 1490 signed by the patient which the, and the laboratory would handle their own billings for the, for the laboratory tests that they had performed.

He told me that he began using a Laboratories of Florida as the lab where he primarily sent blood beginning in early 1975.

I asked the doctor if he owned any interest in Laboratories of Florida and he said no.

I asked him if he received any kind of payments from Laboratories of Florida or from Delmar Porter who owned the lab, and he replied no.

I asked him if he had received any offer of any kind of payment be they drawing fees, kickbacks, rebates or whatever

Court held that a defendant's post-arrest silence, after having received *Miranda* warnings, could not be introduced to impeach his exculpatory testimony at trial. The rationale for those decisions was that

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from Mr. Porter of Laboratories of Florida or any other laboratory and he replied no.

Then he, after hesitating, he said possibly he had received a, he had a discussion with a representative of some lab at some point in time. I asked him would he tell me who this person was or the lab was and he replied no, that he did not want to discuss that further.

Q. Did you discuss procedures followed when complete physicals were provided his patients?

A. Yes. I asked what was typically done, would be done on a patient who came in for a complete physical or workup and the doctor replied in addition to his examination of the person, listening to the heart, lungs and everything, that he had certain other tests and procedures run.

I believe I recall he mentioned specifically a cardiogram, chest x-rays, Pap tests for ladies, prostate checks for men, stool tests and sigmoidoscopies as all being routinely done on a complete physical.

Q. Did you discuss how he did a sigmoidoscopy or his procedure in performing that with him, sir?

A. Yes. I was aware of this form from the investigation, so I asked the doctor if, when this was done, if he discussed beforehand with the patient what was going to be done and how he would go about doing it.

He replied that, yes, that particularly with elderly people he usually discussed the matter beforehand with them, because the elderly patients have many problems, rectal problems, hemorrhoids and other conditions which might cause problems which, he consequently did, caused him to discuss this with the patients before the matter was, procedure was performed.

Q. Did you discuss any mistakes involved in sigmoidoscopies?

A. I asked if he would bill for a sigmoidoscopy when only a prostate check was given and he replied no, that that was not,

> [s]ilence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.

Doyle v. *Ohio, supra*, 426 U.S. at 617.

The instant case is distinguishable. Petitioner was neither under arrest nor subjected to custodial interrogation at the time of his refusal to answer (see *Beckwith* v. *United States*, 425 U.S. 341), and his conduct was not analogous to a defendant's failure to respond to questions after arrest. Petitioner does not claim that he failed to understand his *Miranda* rights, and his statement that he did not wish to discuss the subject of "kickbacks" was a direct answer freely given, not an ambiguous assertion of the right to remain silent. Accordingly, the introduction of this statement into evidence was not inconsistent with either *Hale* or *Doyle, supra*. See *United States* v. *Joyner*, 539 F. 2d 1162 (C.A. 8), certiorari denied, 429 U.S. 983.

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would not be done, that he would bill for sigmoidoscopies when it was done.

Q. Sir, did you discuss any specific patients with him at that time?

A. Yes. I then told the doctor that I would like to discuss certain, some specific cases with him where we had discovered possible irregularities and that it would help if he would make his records available to us on those patients.

He said yes, he would, and I gave him, and initially I gave him a list, I believe, of seven or eight people and he went to pull his medical records on those patients so that we could have it in discussing the patients.

Q. Do you remember what was said about the patients?

A. If I might refresh my memory from the notes I made on those specific patients that I, I discussed, I believe there was eight patients with the doctor. * * *

Even assuming that the testimony to which petitioner now objects (he did not object at trial (Tr. 531)) may have amounted to an improper reference to an exercise by him of his Fifth Amendment privilege (but cf. *United States* v. *Goldman*, C.A. 1, No. 77-1227, decided October 14, 1977), its introduction into evidence, even if error, was clearly harmless in light of the overwhelming evidence of petitioner's guilt (see pages 2-3, *supra*). On that basis the decision below can be reconciled with *United States* v. *Ghiz*, 491 F. 2d 599 (C.A. 4), and *Booton* v. *Hanauer*, 541 F. 2d 296 (C.A. 1), cited by petitioner (Pet. 8-10), for both those decisions recognize that error of the sort of which petitioner complains can be harmless (Pet. App. 19a, 24a-25a).[3]

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[3]Petitioner answered the agent's question whether he had ever received kickbacks, and then said that he might have had a discussion regarding kickbacks with a representative of a testing laboratory (note 2, *supra*). His only objection, therefore, can be to the agent's statement that petitioner refused to name the representative or the laboratory and to discuss the matter further. It is unlikely in the extreme, given petitioner's initial discussion of kickbacks with the agent, that the one arguably objectionable statement by the agent, given in the context of pages of testimony and not directly related to the crime charged, could have prejudiced petitioner. Petitioner's failure to object to the statement at the time it was made supports this view.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1977.

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